

Reforming the Law and the Dead: Insights and Practical Guidance

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'Reforming the Law and the Dead: Insights and Practical Guidance'

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Introduction

In December 2017, the Law Commission for England and Wales announced that "A Modern Framework for Disposing of the Dead" was one of the chosen topics for their 13th Programme of Law Reform.¹ Acknowledging that the current law is "unfit for modern needs" and, in some instances "out of touch with the public's expectations", the Commission announced that it would aim to create "a future-proof legal framework that brings the existing law into line with modern practices".²

This paper looks at how this might develop. It explores the current status of the project; what areas the Law Commission might focus on and any guiding principles; and the key stages in the overall reform process before final recommendations are made and put to Government so that the law can (finally!) be changed. In doing so, the paper will suggest ways in which key stakeholders can feed into and shape the process while pointing out any limitations on what might be achieved- and the need to set some realistic expectations.

1. The Story So Far....

Most of us know that the current law around disposal of the dead and funerals in England and Wales (and in Northern Ireland) is defective in all sorts of ways. The legislation is spread over so many different statutes (many of which are well past their 'sell by date' and/or have had huge chunks repealed); there are all sorts of new trends and developments that existing laws do not cater for; there is a sense that they have not 'moved with the times'; and both the societal landscape and familial structures in Britain have shifted significantly in the last 50-100 years- and seem to be in a constant state of flux.³

There is an urgent need for change; there is also the sense that England and Wales is lagging behind when we look at what has been happening elsewhere:

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¹ Law Commission, *The 13th Programme of Law Reform* (December 2017) and available at <https://www.lawcom.gov.uk/project/13th-programme-of-law-reform/>.

² *The 13th Programme of Law Reform* (December 2017), [2.2]-[2.4].

³ See H Conway, *The Law and the Dead* (Routledge, 2016), ch 9.

- In Scotland major changes have been introduced, and are ongoing, as a result of the Burial and Cremation (Scotland) Act 2016.
- Further afield, the New Zealand Law Commission published a major report in 2015. *Death, Burial and Cremation: A New Law for Contemporary New Zealand* sets out various recommendations over 252 pages (it's an excellent report- one which is very comprehensive, but probably tries to cover too much ground).
- The Victorian Law Reform Commission published a report on *Funeral and Burial Instructions* in 2016; two years earlier, the Queensland Law Reform Commission produced *A Review of the Law in Relation to the Final Disposal of a Dead Body*.

Suffice to say that things have not moved as quickly in England and Wales. Government consulted on reform to burial law as far back as 2004, but announced in 2007 that primary legislation was not a priority; a similar announcement was made in 2012.⁴ Various small-scale, selective changes have been made⁵ but substantive change did not seem to be on the agenda.

However, things took a different turn in 2016. As part of the planning process for its 13th Programme of Law Reform, the Law Commission for England and Wales- the independent statutory body, tasked with keeping the law under review in this jurisdiction- listed burial and cremation as a possible option. It asked for views on whether the current law governing burial and cremation was 'fit for modern conditions', what areas the Law Commission should look at, and what laws might be modernised, simplified or reformed. There was a significant response to this initial scoping exercise; and in December 2017 it was announced that "A Modern Framework for the Disposal of the Dead" was one of 14 projects selected for reform.⁶

2. 13th Programme of Law Reform: Timings

The 13th Programme runs from 13th December 2017. Disposal of the dead (with ultimate policy responsibility under the Ministry of Justice) sits alongside things like Electronic Signatures, Surrogacy, Employment Law Hearings and Automated Vehicles.

Looking at the document itself, some of the fourteen projects have specific start dates while others do not- and 'Disposal of the Dead' falls into the latter category. What does

⁴ *Burial Law and Policy in the 21st Century* (Jan 2004); Jonathan Djanogly, Justice Minister, Hansard HC (16 July 2012), col 544W.

⁵ For example, to the Cremation (England and Wales) Regulations 2008.

⁶ When up and running, the project will focus on England and Wales. The current laws in Northern Ireland suffer from the same basic defects; however, the ongoing political stalemate and the fact that the Northern Ireland Law Commission has been non-operational since April 2015 (due to budgetary pressures) suggests that any comprehensive law reform is unlikely.

this mean? Simply, the projects with specific start dates (eg. Automated Vehicles) have been identified as 'urgent' by various government departments and are funded and prioritised accordingly. So, these go to the proverbial front of the queue.⁷

If we look at 'Disposal of the Dead', there is the noncommittal expected start date of "as and when resources allow".⁸ Unfortunately, it means exactly that: there is no scheduled start date for the project. This is not a case of the Law Commission being deliberately evasive- the genuine answer is that there are so many variables around when any project starts (eg. strategic priorities; finishing projects which are already ongoing; resources etc) that it is impossible to give an anticipated start date for this project.

3. Potential Scope

Back in 2016, when the Law Commission first mooted the idea of looking at burial and cremation laws, it highlighted four potential strands for its project:

- (1) How the law should facilitate efficient use of burial grounds, and the circumstances in which burial grounds can be closed and built upon;
- (2) Consolidating and updating the different statutory provisions applying to burials in churchyards, cemeteries, and private burial grounds;
- (3) Reviewing and codifying the duty to dispose of a dead body, and considering whether individuals' wishes concerning the disposal of their bodies should be legally binding; and
- (4) Examining whether the Cremation Act 1902 confers sufficient powers to make regulations concerning cremation.

Looking at the 2017 report, setting out its 13th Programme of Law Reform, the emphasis seems to have shifted slightly.⁹ The following points are mentioned in the document:

- (1) The fact that new methods of disposal are being developed and are being used in other countries- ie. resomation and promession/cryomation. These methods are "completely unregulated here, which is an unsatisfactory position that acts as a disincentive to innovation and investment, and potentially takes away choice".
- (2) The legislation governing more traditional methods of disposal is "outdated, piecemeal and complex".

⁷ And looking at the latest update from the Commission, there is still no anticipated start date- *Work of the Law Commission- The 13th Programme and Other Projects* (25th June 2018) and available at <https://www.lawcom.gov.uk/document/work-of-the-law-commission/>.

⁸ *The 13th Programme of Law Reform* (December 2017), p 13. As noted, the June 2018 release does not alter this.

⁹ *The 13th Programme of Law Reform* (December 2017), [2.2]-[2.3].

- (3) The fact that the current law does not ensure that a person's own wishes as to the disposal of their remains are carried out; and how the law deals with disputes which arise as to entitlement to a person's remains.
- (4) The fact that the law is "in some instances, out of touch with the public's expectations, and is not always reflective of diverse family structures and an increasingly multicultural and environmentally-aware society".

So, we can perhaps get a sense of what the Law Commission is thinking, at least initially. That is not to say that things are set in stone; and looking at the issues which arise in any of these contexts will trigger others as well.

Yet, what we see here is the Law Commission trying to give some idea of the anticipated project remit (which will probably shift, for reasons mentioned below). This initial remit will have been shaped by the responses which the Commission received as part of the 2016 exercise, and which lead to this project being taken forward. Issues around the re-use of graves are not mentioned in the December 2017 announcement, but perhaps we should not read too much into that: the Law Commission agrees the terms of reference at the outset of a project, and just because there is no specific mention of burial space and re-use of graves does not necessarily mean that this will be excluded.

My own thoughts are that these are the key areas that the Law Commission should be focusing on. We need to be reflective and critical of our existing burial and cremation laws; alert to environmental and space issues; thinking about resomation and promession as emerging bodily disposal methods;¹⁰ funeral wishes should be legally binding; the rules for deciding who is entitled to the deceased's remains and controls the funeral arrangements need to be modified (perhaps remove the executor rule, include cohabitants as next-of-kin, and think about cultural variants etc); and the issue of who 'owns' ashes is a major one in itself!

Other topics could also be included. However, the reality is that these are 'wish lists' only- we can identify areas of the law which need to be reformed, and some will be more urgent or pressing than others; but there simply isn't the scope for the Law Commission to remedy or correct every single problem that exists within the current law in England and Wales.

¹⁰ My own view is that we should have specific legal rules here, rather than incorporating them within existing (maybe slightly modified) cremation laws- as seems to be the position in New South Wales, for example. In the United States of America, those states that have legislated for resomation have different approaches- some treat it as a new variant of cremation, others as a distinct method of corpse disposal with its own rules.

4. How the Process Will Work

There is an old saying, which has been attributed to more than one judge over the years: "Reform, Reform! Aren't things bad enough already?"

Any law reform project will proceed with an element of caution: the aim is to radically improve the law, not make things worse; to think through the various proposals for change and their implications; and to consult as widely as possible at all stages. Once the project starts, a team (probably from the Family and Trusts section of the Commission and led by one of the team lawyers) takes charge of the project, and will work through the following stages:

- **Scoping project**- where the team researches the law and speaks informally with stakeholders, asking for views on what is wrong with the law and potential solutions. It will also liaise with relevant government departments and bodies (eg. Ministry of Justice) to ensure that there is 'joined up' thinking and no overlap of projects.
- **Formal consultation paper**- this is a detailed paper, identifying the areas of the law that the Law Commission is focusing on, the relevant defects or gaps in the current legal framework, and proposing specific reform suggestions. Once drafted, the consultation paper is subject to peer review by Commissioners (it is the work of the Law Commission, not just the team working on the project). The paper is then published, inviting responses from stakeholders and the public, with a specific closing date for responses to be submitted (usually a number of months later, to allow for an informed response). The consultation paper will contain a mix of open questions and calls for evidence, and provisional proposals setting out initial policy suggestions.
- **Analysis and formulation**- after the consultation responses are received, these are analysed by the Law Commission project team; it then formulates a final policy, drafts a report and (where relevant) instructs in-house Parliamentary Counsel to draft a bill. Again, everything goes through peer review before publication, so the publications are the agreed view of the Commission, rather than the view of the team.
- The **final report and draft Bill are then published**, with a further (but shorter) response period- then the Law Commission makes recommendations to Government, and the law reform proposals should be implemented.

The scoping project and responses to the consultation paper are probably the key elements of the process. Rough 'standard' timings for a project are 1 year to the published consultation paper, and around 3 years in total for the report, bill and 'impact assessment' (basically a prospective analysis of the consequences of what is being proposed and the impact that changing the laws will have on those affected; it also checks that the changes are fair, proportionate, human rights compliant etc).

We all know that this has the potential to be a huge project- and the Law Commission will be conscious of this as well, and of the complexities of the issues that are raised. The Commission will try to cover as much ground as possible since the aim is for a comprehensive reform of the law; however, when the project starts and the Commission carries out the initial scoping exercise, it may become clear that it cannot deal with all the issues raised and will have to prioritise which ones it does deal with. The Commission will be guided by what it can realistically achieve with the time and resources available: what can it do, and do properly, within a 3 year time period?

5. 'Stakeholder Input': Shaping the Process

Stakeholder input is invaluable, and will play an integral role in informing and shaping the law reform process. Of course, the consultation process will be open to members of the public, and the Law Commission is always keen to hear these views. But stakeholder responses can give a more reflective sense of the size and scale of any problems, and the impact these are having. And- with respect- such responses tend to be more informed, and less emotionally driven, than public responses.

When it comes to reforming bodily disposal laws, the Law Commission will want to hear from as many key stakeholders as possible. So the various professional bodies, industry groups and representatives, associations, local authorities, cemetery and crematoria managers, research groups etc should be actively involved in the process; lawyers who have dealt first-hand with cases involving these issues will be asked for their views, as will academics working in the area; representatives of religious and other belief groups should feed into the discussion, as should charities who work in death and bereavement. The Commission will want to hear from individuals and bodies who have 'hard' evidence about the problems in the current law and the extent of the difficulties this is creating, and who are also used to dealing with the sort of sensitive issues and complex human

dynamics that are such a big part of this project.¹¹ All responses and submissions will be publicly acknowledged in the final report: the process is an open and transparent one.

So, the Commission will want to engage with a range of stakeholders, and is likely to be strongly influenced by these views. Note however, that the Commission is not in a position to meet with stakeholders or engage in active discussions until it starts the project as the Commission is fully focused on ongoing projects.

But, once the project starts, how should stakeholders approach it?

(a) Joint Submissions

At the Bereavement Services Seminar which was held in March 2018, Richard Barradel spoke about the Law Commission project, and there was some discussion in that paper and in the Q & A session afterwards about various bodies coming together and submitting a joint response where mutual interests and professional experience overlap. This should not be discouraged: joint responses can carry a lot of weight and can give a strong sense of the extent of any problems that are occurring (and it is obvious that the Law Commission is likely to be swayed more by an articulated industry response from a number of bodies, than a solitary letter from a member of the public).

However, there are two points to note here:

- (i) Avoid 'consensus for the sake of consensus'- in other words, do not try to broach an agreement for the sake of trying to persuade the Law Commission that everyone is in agreement. As the saying goes 'the truth will out': and the reality is that any significant divergences of opinion will probably come to light when the Commission publishes its final report with recommendations for reform and a draft Bill (at which stage different groups might come forward, and say that this is not really what they had contemplated all along).
- (ii) If there are different perspectives, it is better to make them known to the Law Commission rather than having a joint submission with a veneer of consensus (which can sometimes be easy to spot, and might make the Law Commission cautious about proceeding on that particular evidence basis). So, single submissions are probably better where there are significantly differing views

¹¹ For a sense of the importance of stakeholder input, and the range of potential contributors, it might be worth having a look at the ongoing Law Commission project on *Wills* (available on the Commission's website)- see <https://www.lawcom.gov.uk/project/wills/>. The various documents are accessible from the bottom of that page.

on a number of issues; joint submissions are probably ok where the differences are minor or small in number- but it is better to say that 'while the majority think X, a minority think Y' on this particular issue.

Bear in mind, as well, that being exposed to areas of disagreement can actually help the Law Commission's work on the project.

(b) Submissions Should be 'Evidence Based'

When contributing to the initial scoping project and the consultation paper, try to supply as much 'hard' evidence as possible. The Law Commission probably has a strong sense of the extent of the problems that are occurring here- but ideally, it needs evidence to back this up. So saying things like 'we believe a problem exists', 'we think that law X is not working' is not ideal. It is better to supply as much evidence as possible – 'speaking to our members, this seems to be an issue in X% of funerals'; 'we receive on average, X queries about this each month'.

Basically, supply anything that conveys a sense of the extent of the problems and the difficulties these are creating for the public, professionals, those working in the funeral industry etc. (And if there's a sense of the economic impact, alongside the human impact, this information is useful as well). Showing the extent of the problem also enables the Law Commission to change the law in the way which will have the maximum impact and benefit for the largest number of people.

(c) Get Your Priorities Right

We all have views on what is wrong with the existing laws around bodily disposal, and what needs to be changed. But, as mentioned earlier, this process is not going to address every single concern that we have and introduce a sweep of new laws that tackle every single problem. It is just not feasible.

So, we have to prioritise: things which are more pressing/urgent/essential go to the top of the list while others rank lower down (to use the internet shopping analogy, some items are probably 'add to bag' and others are 'add to wish list'). This does not mean that we should focus solely on the pressing issues; we should highlight the others as well, but indicate which matters need to be dealt with as a matter of priority.

6. Reasons for Optimism?

There are reasons to be optimistic. The Law Commission has identified 'Disposal of the Dead' as a specific project in its 13th Programme of Law Reform. This means that it is very aware of the issues raised by the gaps and deficiencies in the current law in England and Wales, and has a sense of the problems this is creating. It follows that the Commission can also see the wider benefits of reform in this area.

The Commission's overriding aim will be to make the law clearer and more certain- in short, to make things better than they currently are. But, it will know that this is a sensitive area and that the laws which apply here have to be seen in a specific emotional context. Again, the ongoing wills project is a useful comparator: people are encountering the law at a difficult time, and it is essential that the law gives certainty, assurance and answers to those using it (not just the public, the bereaved- but to those working in the burial/cremation/funeral industries as well).

Finally, there seems to be an appetite for change within the industry, and from those of us researching and working in the area. Supporting the need for change, and keeping this on the reform agenda by whatever means possible will be important- we need to keep reminding the Commission that this is an important topic which affects many people and needs to be looked at.

7. Reasons for Caution?

Without wishing to end on a low, there are several:

- The scale of what needs to be done: this is going to be an ambitious project, and not everything can be accomplished.
- As a general rule, many attempts at legal reform have failed dismally (across all areas of law). There are probably more law reform papers gathering dust on the shelves (or the electronic equivalent), than have been carried forward and implemented.
- Time will always be an issue, as will resources.
- Brexit is an issue that we cannot avoid: we are in a time of legal uncertainty, and there is always the prospect that Brexit related work displaces other law reform projects.

- Even if the project gets taken forward, reforms may not materialise for all sorts of reasons. Once the Commission's work is complete, it is up to the Government to take the recommendations forward and implement the actual changes- something which does not always happen, for all sorts of reasons.

Like everything in life, there are no guarantees when it comes to death either.